87-1537
NO. _____

Supreme Court, U.S.
FILED
MAR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARY ELAINE CROWLEY,

Petitioner,

v.

NEW HAMPSHIRE PERSONNEL COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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March 11, 1988

QUESTION PRESENTED

Do the principles of due process prevent a state administrative agency, during a post-termination hearing,from refusing to allow the employee to introduce or cross examine the state's witnesses concerning three documents,when the employee's allegedly willful possession of the documents is the sole basis of the termination?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Mary Elaine Crowley, and the respondent, New Hampshire Personnel Commission (now known as the Personnel Appeals Board).

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NEW HAMPSHIRE PERSONNEL COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

The petitioner, Mary Elaine Crowley, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of New Hampshire entered in the above-entitled proceeding on October 1, 1987.

OPINIONS BELOW

The order of the Supreme Court of the State of New Hampshire, not officially reported, affirming the decision of the Personnel Appeals Board appears in the Appendix hereto, p. 12a, *infra*.

The order of the Supreme Court of the State of New Hampshire denying petitioner's request for a rehearing, appears in the Appendix attached hereto, p. 12a, *infra*.

The order of the New Hampshire Personnel Appeals Board (formerly New Hampshire Personnel Commission) upholding petitioner's termination from state employment, also appears in the Appendix attached hereto, p. 6a, *infra*.

JURISDICTION

Invoking her statutory rights under N.H.R.S.A. 98:15, the petitioner appealed her termination from the New Hampshire Sweepstakes Commission to the Personnel Appeals Board (formerly Personnel Commission). After hearing, the Personnel Appeals Board issued an order on February 27, 1986, upholding petitioner's termination. Petitioner timely moved for a rehearing which was denied on June 3, 1986.

Petitioner then appealed the decision of the Board by appeal to the New Hampshire Supreme Court pursuant to RSA 541:6. After submitting briefs and oral arguments, the New Hampshire Supreme Court issued an order without written opinion affirming the decision of the Board on October 1, 1987. Petitioner timely moved for reconsideration which was denied on December 15, 1987. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States states, in pertinent part, as follows:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

2. New Hampshire Revised Statutes Annotated 98:4 (1977) is fully set forth in the Appendix attached hereto, p. 1a, *infra*.

3. New Hampshire Revised Statutes Annotated 98:8, III (1977) is fully set forth in the Appendix attached hereto, p. 1a, *infra*.

4. New Hampshire Revised Statutes Annotated 98:15, (1977)

is fully set forth in the Appendix attached hereto, p. 2a, *infra*.

5. New Hampshire Revised Statutes Annotated 541:6 (1974) is fully set forth in the Appendix attached hereto, p. 2a, *infra*.

6. The State of New Hampshire Rules of Department of Personnel, Rule 308:03 is fully set forth in the Appendix attached hereto, p. 2a, *infra*.

STATEMENT OF THE CASE

Petitioner, Elaine Crowley, began her employment as a Bingo Inspector for the New Hampshire Sweepstakes Commission ("Commission") in September, 1981. Her primary duties were to audit the records kept by bingo halls assigned to her by her supervisor and to insure that each hall complied with statutory requirements before being issued a license. Like other bingo inspectors, petitioner worked mostly at night attending and auditing bingo games within her assigned area. Because of the nature of her employment and the late working hours, it was Commission policy to allow Inspectors such as the petitioner to work from offices in their homes and to allow them to keep photocopies of the records of the bingo halls at those offices. During this time, Elaine Crowley was given two handwritten notes by the Director of Sweepstakes indicating in substance that he would assume the responsibility to audit a certain bingo hall under her jurisdiction. This alarmed her to the point that she photocopied the notes and a schedule indicating the date, and kept them for her protection. She placed the three documents under mattress.

In October of 1984, Mr. George Jones became the Executive Director of the New Hampshire Sweepstakes Commission. On April 18, 1985, Mr. Jones made a policy that the files of all bingo inspectors should be maintained at the Sweepstakes Office in Concord, New Hampshire. Elaine Crowley, along with all other bingo inspectors, complied with this rule. It is important here to note that no allegation had ever been made that Elaine Crowley failed to maintain her files properly or took any

materials from her files.

On or about October 28, 1985, Petitioner was asked by her supervisor whether she had ever reviewed the financial records of particular bingo halls that previously had been in her territory, but were recently found not to be in compliance back in 1982. Petitioner replied that she had not. Upon reflection at home, the petitioner remembered that she had long ago hidden the office memo and two pieces of paper relating to the bingo halls mentioned by her supervisor in a folder under her mattress. She removed the information and telephoned her supervisor to say that she discovered she had documents in her possession relating to her failure to inspect the bingo halls in 1982. She asked the supervisor if he would like them, and he replied he would. The Petitioner, at this time, two and a half years after she had hidden the photocopies of the notes relating to the bingo hall mentioned by her supervisor, retrieved the documents and give them to him.

Petitioner heard no more about the three documents until November 12, 1985, when she was summoned to the office of Director Jones and handed a letter of termination from employment at the New Hampshire Sweepstakes Commission. The stated charge for which she was terminated was willful insubordination for failure to obey the April 18, 1985, memorandum. The Director refused to hear petitioner's explanations of how she came to be in possession of the three documents in question; how she had forgotten that she had hidden them some 2 1/2 years earlier; and the circumstances surrounding her rediscovery of them. She then was ordered to leave the premises.

Petitioner immediately requested a hearing before the New Hampshire Personnel Commission in accordance with N.H. RSA 98:15 (1977); the hearing was held on January 20, 1986. The issue before the Commission was whether the petitioner's failure to return the three documents in accordance with the Director's April 18, 1985, memorandum was an act of willful insubordination giving the Director grounds for discharge in accordance with New Hampshire Code of Administrative

Rules, Rule Per 308.03(1983) (attached in Appendix hereto, p. 2a, *infra.*)

At the hearing, the State opened its case with the testimony of the petitioner's current supervisor who explained how he came to discover that the petitioner had in her possession the three documents in issue. During the course of his testimony, he stated that the documents were Sweepstakes records concerning Bingo investigations. (Hearing Transcript at 9-11). When petitioner's counsel attempted to cross-examine the witness regarding the actual contents of the documents, the State requested that the Commission go into executive session arguing that the documents were confidential records not subject to disclosure. (Hearing Transcript at 23 and 24 attached in Appendix hereto, p. 13a, *infra.*)

Although no recording was made of the proceedings in executive session, both its length (1 hour) and other references in the record make clear that, over the petitioner's objection, the Commission refused to allow the petitioner to introduce the documents into evidence or to elicit any testimony regarding the actual subject matter contained in the documents. (*See* Hearing Transcript at 25, 27, 74, attached in Appendix hereto, pp. 15a - 17a, *infra.*) On the evidence before it, the Commission upheld Petitioner's discharge for willful insubordination.

In Petitioner's request for a rehearing, Petitioner again raised several issues, one of which was that the hearing procedure lacked constitutional safeguards because she was "prevented from fully questioning witnesses on the three papers that formed the basis of her termination." (*See* Petitioner's April 21, 1986 letter to New Hampshire Personnel Appeals Board, p.2, attached in Appendix hereto, p. 9a, *infra.*). Petitioner's request for reconsideration was denied.

The Petitioner then appealed the decision of the Commission, now known as the New Hampshire Personnel Appeals Board, to the New Hampshire Supreme Court pursuant to N.H. R.S.A. 541:6. Both in her Appeal by Petition and in her Brief, petitioner raised the issue of whether the Commission's refusal to

allow evidence concerning the contents or the circumstances of petitioner's possession and rediscovery of the documents denied her due process of law in violation of the Fourteenth Amendment. (Appellant's Appeal by Petition, pp. 24, 28-33; Appellant's Brief, pp. 24-25, 28-34). In an order issued without opinion, the New Hampshire Supreme Court affirmed the agency's decision.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Supreme Court of the State of New Hampshire is contrary to United States Supreme Court precedent.

In denying petitioner's claim that the New Hampshire Personnel Appeals Board (formerly the New Hampshire Personnel Commission) violated her right to due process of law, the New Hampshire Supreme Court declined to issue a formal written opinion, instead affirming the agency decision and citing *Desmarais* v. *State Personnel Commission,* 117 N.H. 582, 586, 378 A.2d 1361, 1363 (1977). An examination of *Desmarais* and the line of cases leading up to it reveals that the New Hampshire Supreme Court has consistently failed to apply the analysis required by this Court to determine whether an appellant has a property interest protected by the due process clause of the Fourteenth Amendment.

This Court has long held that property interests are not created by the Constitution;, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . ." *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532, 538, 105 S. Ct. 1487, 1491, 84 L. Ed. 2d 494 (1985); *Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). This Court has also held, however, that "*federal* constitutional law determines whether the interest rises to the level of a

'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas and Water Division* v. *Craft,* 436 U.S. 1,, 9, 98 S. Ct. 1554, 1559, 56 L. Ed. 2d 30 (1978) (emphasis added); *Board of Regents* v. *Roth,* 408 U.S. at 577, 92 S. Ct. at 2709.

Under federal law, the hallmark of a "property" interest protected by the due process clause of the Fourteenth Amendment is individual entitlement grounded in state law which cannot be removed except for cause. *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 430, 102 S. Ct. 1148, 1155, 71 L. Ed. 2d 265 (1982); *Memphis Light, Gas and Water Division* v. *Craft,* 436 U.S. at 11-12, 98 S. Ct. at 1561-1562.

The terms of Rule Per 308.05, the rule in effect at the time petitioner was terminated, make clear that petitioner could only be discharged "for cause." Although the Rule expressly allows a classified employee to be terminated for reasons other than those enumerated in the rule, the rule does not allow termination at will. In substance and effect, it is equivalent to a "for cause" termination statute, identical to those recognized by this Court to give rise to property interests protected by the due process clause of the Fourteenth Amendment. *See Cleveland Board of Education* v. *Loudermill,* 470 U.S. at 538-39, 105 S. Ct. at 1491; *Logan* v. *Zimmerman Brush Co.,* 455 U.S. at 430, 102 S. Ct. at 1155; *Memphis Light, Gas and Water Division* v. *Craft,* 436 U.S. at 11, 98 S. Ct. at 1561.

A long line of appellants to the New Hampshire Supreme Court, including petitioner, have sought without success to assert that a classified state employee has a property interest in his or her state employment, entitled to the protection afforded by the Fourteenth Amendment. The response of the New Hampshire Supreme Court consistently has been to summarily dismiss such claims, quoting this Court's deference to the states to create and define property interests, as articulated in *Roth. See Burrage* v. *New Hampshire Police Standards Council,* 127 N.H. 742, 744-745, 506 A.2d 342, 344 (1986); *Colburn* v. *State Personnel Commission,* 118 N.H. 60, 64, 382 A.2d 907, 908 (1978); *Desmarais* v. *State Personnel Commission,* 117 N.H. 582,

588, 378 A.2d 1361, 1364 (1977); *McIntosh* v. *State Personnel Commission*, 117 N.H. 334, 374 A.2d 436, 437 (1977); *Nason* v. *State Personnel Commission*, 117 N.H. 140, 143, 370 A.2d 634, 637 (1977).

The New Hampshire Supreme Court's rote recital of its own precedent as support for its denial of Fourteenth Amendment protection to New Hampshire State employees is contrary to this Court's holdings in two critical respects:

(A) The analysis used in the foundation case, *Nason* v. *State Personnel Commission*, 117 N.H. at 140, 370 A.2d at 634 is constitutionally infirm, thereby invalidating the entire line of the cases which adopt its holding as precedent. In *Nason*, the state court determined the question of whether a state employee had a constitutionally protected property right by looking to the statutory procedures provided for suspension,[1] an approach clearly rejected by this Court in *Vitek* v. *Jones*, 445 U.S. 480, 491, 100 S. Ct. 1254, 1263, 63 L. Ed.2d 552 (1980).

(B) The New Hampshire Supreme Court's use of its own precedent to hold that there is no property interest "grounded in state law," while ignoring the New Hampshire statutes and administrative rules establishing the terms of state employment, has no basis in federal constitutional law and impermissibly allows the State Supreme Court to destroy at will virtually any property interest in state employment created by the New Hampshire legislature or State Personnel Board. See *Logan* v. *Zimmerman Brush Co.*, 45 U.S. at 432, 102 S. Ct. at 1156.

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1. In finding no protected property right, the New Hampshire Supreme Court stated:

> [T]he fact that suspension may, under the rules, be at the appointing authority's discretion, *without notice or hearing*, negatives the argument that plaintiff had a property interest in continued employment without suspension which would give him the right, under Federal Constitution to a presuspension hearing.

117 N.H. at 143, 370 A.2d at 637 (emphasis added).

Because the New Hampshire Court continues to inadequately protect state employees' right to due process of law under the Fourteenth Amendment, review by this Court is essential.

II.

The decision below raises important and unresolved issues concerning the appropriateness of a reviewing court's presumption that an administrative agency's findings of fact are "lawful and reasonable" in cases where claims of denial of due process in the administrative proceedings have been properly raised.

Although the New Hampshire Supreme Court's order of October 1, 1987, is brief, the case cited therein is a clear indication of its underlying rationale. In *Desmarais,* at the page referenced in the order, the state court reiterated its position that findings of fact by an administrative agency are "prime facie lawful and reasonable" and "entitled to great weight." 117 N.H. at 586, 378 A.2d at 1363, citing N.H.R.S.A. 541:13. The appropriateness of the State Court's presumption in the face of claims by appellants that agency adjudicatory hearings were conducted in violation of federal due process rights is a question deserving serious consideration by this court.

The central issue regarding the hearing conducted by the Personnel Appeals Board is whether the effect of its evidentiary rulings was to deny petitioner's right to due process. In general, evidence is admissible in an agency proceeding even though it might ordinarily be excluded in a court hearing; however, the right to admit such evidence does not imply that agencies are also free to exclude relevant evidence.

The fundamental principles of due process require that a deprivation of life, liberty, or property, be preceded by notice and opportunity to be heard. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950). In keeping with these principles, the refusal of an administrative agency to receive and consider competent and

material evidence in rebuttal to the state's case is a denial of due process of law. *Russell-Newman Manufacturing Co.* v. *N.L.R.B.*, 370 F.2d 980, (5th Cir. 1966).

In addition to functioning as a reviewing court of administrative agencies, state courts bear equal responsibility with the federal courts to guard and protect rights secured by the Constitution of the United States. *Horn* v. *O'Cheskey,* 378 F. Supp. 1280 (D.N.M. 1974). Essential to the discharge of a reviewing court's responsibility is an administrative record that presents the relevant and material facts, and a determination by the courts of whether a particular administrative record fairly does so requires an examination of the whole record.

Query, then, whether a state court's presumption that administrative findings of fact are lawful and reasonable is properly applied in cases where an appellant has asserted a claim that the record before both the agency and the reviewing court is the product of a proceeding where appellant's due process rights were violated. Because the state courts need guidance in this area, petitioner urges this Court to grant her petition for certiorari.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that this is her only opportunity to seek review of the New Hampshire Supreme Court's rulings on petitioner's federal constitutional claims.

Respectfully submitted,

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APPENDIX:

STATUTORY PROVISIONS INVOLVED

N.H.R.S.A. 98:4 **Members.**
There shall be a personnel commission of 3 members, not more than 2 of whom shall be of the same political party, hereinafter called the commission, and a director of personnel, with the powers and duties hereinafter enumerated.

N.H.R.S.A. 98:8 **Duties of Commission.**
The Commission shall:
. . . III. Make such rules and regulations subject to the approval of the governor and council, as it shall deem necessary or proper to carry out its purpose. . .

N.H.R.S.A. 98:15 **Appeal.**

Any permanent employee who is dismissed or demoted or who is suspended may, within 15 days after such dismissal, demotion, or suspension, appeal to the commission for review thereof. Upon such review, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard publicly. At the hearing of such appeals, the commission may establish such reasonable rules of procedure and for the admission of evidence as it deems advisable. If the commission finds that the action complained of was taken by the appointing authority for any political, religious or racial reason, the employee shall be reinstated to his former position or a position of like seniority, status and pay, without loss of pay for the period of his suspension. In all cases, the commission may reinstate any employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just. Any action or decision taken or made hereunder shall be subject to rehearing and appeal as provided in RSA 541.

N.H. R.S.A. 541:6 **Appeal.**

Within thirty days after he application for a rehearing is denied, or if the application is granted, then within thirty days after decision on such rehearing, the applicant may appeal by petition to the supreme court.

New Hampshire Administrative Rule, Per 308:03 **Discipline.**

In order to protect the interests of classified employees and the efficiency of state service, three forms of discipline are recognized:

(a) Discharge - mandatory and optional

(b) Written reprimand

(c) Oral reprimand

(1) Mandatory discharge. Immediate discharge is mandatory without warning in cases such as, but not necessarily limited to, those below, provided that the offense in question is clearly established.

a. Stealing from the state or any employee.

b. Immoral behavior.

c. Violation of a posted or published rule that, in itself warned of automatic discharge.
d. Fighting or attempting to injure others (aggressor only).
e. An employee found to be a subversive person under the provisions of RSA 648.

(2) Optional discharge. In cases such as, but not necessarily limited to the following, the seriousness of the violation may vary. Therefore, in some instances immediate discharge without warning prior to discharge may be indicated. Repetition of any of the following offenses after one written warning has been given makes the discharge of the offender mandatory.

a. Willful destruction of state property.
b. Willful insubordination.
c. Refusal to accept job assignments.
d. Absence for a period of three consecutive working days without notification to his department unless adequate excuse is given.
e. Willful falsification of claims for annual and/or sick leave.
f. Inability to perform duty assignments due to being under the influence of drugs or alcohol.

(3) Other offenses, such as:

a. Lateness
b. Absenteeism without approved leave
c. Practical joking
d. Obscene language
e. Unsatisfactory work
f. Lack of cooperation

(4) Other offenses shall be handled as follows:

a. One or more oral warnings may be given to the employee by the appointing authority. At the appointing authority's discretion, any number of oral warnings may be given depending upon the attitude of the employee and the appointing authority's

judgment of the seriousness of the offense. It is the appointing authority's responsibility to point out the specific nature of the offense and discuss in detail with the employee the correct action to be followed in the future.

b. If the appointing authority feels oral warnings have been, are, or would be ineffective or insufficient in view of the attitude of the employee, and/or the nature of the offense, a written warning shall be prepared. Warnings must indicate that unless corrective action is taken the employee will be subject to discharge.

c. Written warnings shall be prepared in triplicate by the appointing authority. This form shall be signed by both the appointing authority and the employee. If the employee refuses to sign, the appointing authority shall so state.

d. If an employee who has received a written warning takes exception to it, he shall have 15 working days in which to initiate action under the grievance or appeal procedure. If such action is not taken within 15 working days, it will be assumed that the employee has acknowledged that the warning was justified. The commission shall schedule a hearing on such warning appeal as its case load permits, but each appeal need not be heard individually and may be consolidated with subsequent warning appeals as well as any eventual dismissal hearing based upon those warnings.

e. Employee who receive 2 written warnings for the same offense may be discharged by receipt of a final written notice of subsequent violation for that offense. Employees who receive 4 written warnings for various offenses may be discharged upon receipt of a 5th written warning for any type of offense.

f. Each written warning shall expire as a basis of possible discharge 2 years after its date but shall be kept in the employee's file in the department of personnel.

g. In cases of doubt as to whether or not written warning is given, the files of the department of personnel shall be taken as final authority.

h. Oral warnings. Any type of oral warning may be noted by the appointing authority and may be retained, however, such notations shall not become a part of the employee's file. In any subsequent disciplinary action or appeal, the notation of an oral warning may be referred to and introduced into evidence.

i. Whenever possible, before any type of disciplinary action appealable to the personnel commission is taken by an appointing authority or within 10 working days from the date of the action, the employee shall be entitled, with representation if requested, to a hearing (an informal meeting) between an employee and/or his chosen representative for the purpose of attempting to adjust the problem before said appointing authority.

j. At the discretion of appointing authorities, permanent employees who are of such physical condition as to make it impossible for them to satisfactorily perform their work assignments can be discharged for unsatisfactory work. Opportunity shall be given, however, if possible, for transfer or demotion in lieu of discharge to a type of employment the employee can perform.

k. Changes in administration or supervisory personnel is not reason for subordinate employees to be discharged. The rules given appointing authorities sufficient leeway to discharge with cause subject to reasonable notice.

Order and Decision of the New Hampshire Personnel Commission

[page 1]

NEW HAMPSHIRE PERSONNEL COMMISSION DECISION

In the Matter of:

Elaine Crowley
February 27, 1986

Elaine Crowley was terminated November 12, 1985 from employment at the New Hampshire Sweepstakes Commission. The hearing was held January 30, 1986 before the Personnel Commission, Commissioners Haseltine and Duprey sitting.

Ms. Crowley served as a bingo inspector. She was terminated on the grounds of willful insubordination pursuant to Personnel Rule 308.03(2).

The central facts are not in dispute. On April 18, 1985 the Executive Director of the sweepstakes Commission issued office procedures indicating that all files and copies of records were to be kept at the Commission offices. No files were to leave the property without the Executive Director's permission. The appellant was notified of this policy on a number of occasions before the incident which led to her termination.

On October 28, 1985 Peter Olkkola, Ms. Crowley's supervisor, inquired whether she had ever performed an audit of a certain charitable organization. Ms. Crowley advised him that she had not. She later advised him that she had looked at her records at home and had some papers which might be useful to Mr. Olkkola. She then produced those the next day.

Ms. Crowley testified that she did not intentionally violate the policy and had only kept a copy of these papers at home by mistake.

The particular papers involved were not of great significance.

However, because the hearing was held in executive session at the request of both parties, the papers were not introduced into evidence and need no further amplification. It need only be pointed out that they were handwritten notes which related to Commission business. They clearly were records which could be important to the agency. They also, in the Commission's view, were records that Ms. Crowley was advised to turn in and not to retain copies of. While we understand that anyone can make a mistake, we think she was clearly advised of the policy

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of the Commission and that her failure to turn in copies of the particular records was more than a mistake. Having been told of the importance of the return of all records, we think her mistake is unacceptable practice. For that reason, we uphold her termination and deny the appeal.

The Sweepstakes Commission's request for findings of facts and rulings of law are disposed of as follows:

> Findings of Fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are granted. Requests for rulings of law 1, 2, and 3 are granted.

FOR THE PERSONNEL COMMISSION

JUDY S. BASTIAN, secretary
N. H. Personnel Commission

mas
cc: George Jones, Executive Director
New Hampshire Sweepstakes Commission

William Briggs, General Counsel
State Employees' Association of N. H.

Petitioner's Motion for Rehearing by Personnel Commission

[page 1]

April 21, 1986

Mary Ann Steele, Secretary
N.H. Personnel Appeals Board
State House Annex
Concord, NH 03301

RE: RSA 541:3 Motion for a Rehearing in the Matter of Elaine Crowley

Dear Mrs. Steele:

Pursuant to the provisions of RSA 541:3, Elaine Crowley seeks a rehearing in the matter of her termination from employment at the N.H. Sweepstakes Commission. In support of the above, she states:

1. That she was terminated for allegedly being willfully insubordinate pursuant to Administrative Rule 308.03. The N.H. Supreme Court, in the case of *Foote* v. *State Personnel Commission*, 116 N.H. 145 (1976), defined the elements of this offense to be the *willful refusal* to accede to a legitimate and reasonable demand of the employer (emphasis added).

At the time of hearing, the State presented no evidence that Ms. Crowley intentionally refused to accede to the request of George Jones that all bingo information be returned to the N.H. Sweepstakes offices. Therefore, the essential element of willful refusal was not proved, without which the offense of willful insubordination may not be sustained.

2. The decision of the Personnel Commission to deny Ms. Crowley's appeal is inconsistent with its finding of facts. Again, to sustain the offense of willful insubordination, the State must prove by a preponderance that Ms. Crowley intentionally and

refused to return bingo information and that she intended to withhold that information from the Sweepstakes Commission.

In its decision, the Commission found, under finding 9, that Ms. Crowley had been looking through papers at home and had *found* some information (emphasis added). The Commission may not legally nor logically arrive at a decision that Ms. Crowley was willfully insubordinate, i.e., that she intentionally withheld information, if they found that she had mistakenly not returned information on April 18, 1985, as they did in their decision without a concurrent finding that she discovered her mistake after April 18, 1985 and prior to October 28, 1985, and did not take immediate steps to rectify it. The Commission made no such finding.

[page 2]

3. RSA 541-A and RSA 98 require that all State agency personnel rules and policies supplementing the Administrative Rules of the Department of Personnel receive Department of Personnel approval or they shall be null and void. The State has offered no evidence that George Jones received Department of Personnel approval for Office Procedures Memo #6. This office memo changed a standing personnel practice of the Sweepstakes Commission which allowed bingo inspectors to keep information at their homes and formed the basis for the Personnel action taken against Ms. Crowley. Without having received prior approval, Sweepstakes Memo #6 is null and void and may not be used as a basis for Ms. Crowley's termination.

4. The Hearings Procedure of the Personnel Commission lacked constitutional safeguards.

Examples of the lack of constitutional safeguards are that Ms. Crowley was prevented from fully questioning witnesses on the three papers that formed the basis for her termination; the State, without any showing, was allowed to prejudice the Board by inferences that Ms. Crowley was illegally in possession of those papers; the State confiscated these three papers from Ms. Crowley without any showing that it was essential to do so; and

much of the State's testimony was hearsay and was prejudicial to Ms. Crowley in that it concerned areas not covered in her letter of termination.

For the above reasons, Ms. Crowley seeks a rehearing of her termination appeal on a decision that is inconsistent with the evidence presented at the time of hearing.

Sincerely,

William P. Briggs
General Counsel

:lks

Order of New Hampshire Personnel Appeals Board denying Motion for Rehearing

June 3, 1986

William P. Briggs
General Counsel
State Employees' Association of N. H.
163 Manchester Street
Concord, New Hampshire 03301

re: Elaine Crowley

Dear Attorney Briggs:

At the May 20, 1986 meeting of the Personnel Appeals Board, Commissioners Haseltine and Allard considered your Motion for Rehearing in the Matter of Elaine Crowley, and Assistant Attorney General David Peck's State's Opposition to Motion for Rehearing. Commissioner Platt did not participate in action taken in this matter.

Having reviewed the record in this matter, and your Motion for Rehearing, the Appeals Board found no good cause shown to grant your request for rehearing.

Based on the foregoing, the Personnel Appeals Board reaffirmed the February 27, 1986 decision of the Personnel Commission in the matter of Elaine Crowley, and unanimously voted to deny your request for rehearing.

Very truly yours,

FOR THE PERSONNEL APPEALS BOARD

MARY ANN STEELE
Executive Secretary
N. H. Personnel Appeals Board

mas
cc: Assistant Attorney General David Peck
Office of the Attorney General

George Jones, Executive Director
N. H. Sweepstakes Commission

Judy S. Bastian
Director of Personnel

Order and Opinion of the
New Hampshire Supreme Court

In Case No. **86-277 Petition of Mary E. Crowley**
the court upon **October 1, 1987** made the following order:

After consideration of the briefs and oral arguments of the parties, the court concludes that disposition of this case does not require a formal written opinion.

The petitioner argues that the State Personnel Appeals Board (the board), formerly known as the State Personnel Commission, "abused its discretion or erred as a matter of law" in upholding her discharge from employment by the New Hampshire Sweepstakes Commission. Having reviewed the record before us, we find no error and affirm the decision of the board. *See Desmarais* v. *State Personnel Commission*,117 N.H. 582, 586, 378 A.2d 1361, 1363 (1977).

Affirmed.

Ralph H. Wood, Clerk

Order of the New Hampshire Supreme Court denying
Petitioner's Motion for Reconsideration

In Case No. **86-277 Petition of Mary E. Crowley**
the court upon **December 15, 1987** made the following order:

Plaintiff's motion for reconsideration is denied.

Distribution:
Personnel Commission
SEA of N.H.
John A. Rachel, Esq.
David S. Peck, Esq.
File

**In the Matter of Elaine Crowley–
Transcript of Hearing before New Hampshire
Personnel Commission January 30, 1986**

[page 23]:

Mr. Olkkola: Uh, I guess that's correct.

Atty. Briggs: And was this the information, and asked you if you'd like to have copies of it?

Mr. Olkkola: That's correct.

Atty. Briggs: And brought you in copies the next morning.

Mr. Olkkola: That's correct.

Atty. Briggs: Okay, are these... is this the information that she brought you?

Atty. Platt: I'd, I'd like to ask the Commission to go into executive session right now so that, to discuss this issue with counsel.

Comm. Duprey: Discuss...

Atty. Platt: We have some confidential records that I assume are going to be offered into evidence in about one second and I'd like to bring it to the Commission's attention before we actually get into discussing these particular records, which we were unaware were in Ms. Crowley's or her counsel's possession.

[page 24]

Comm. Duprey: Are you reasonably sure they're confidential? They aren't subject to the right to know?

Atty. Platt: Yes, I'm reasonably sure they are. And I'd certainly like to make that argument and discuss it.

Comm. Duprey: That sounds reasonable. We should give her the opportunity to make the argument. What we'll do, if we might then, is... there's been a suggestion that a record about to be introduced is a confidential record which is not subject to the Right-to-Know law, and perhaps we shouldn't even see it. So in order to let the attorneys have a full opportunity to convince us one way or the other, I assume you'll discuss these a little bit... and therefore I guess we'll go into a brief executive session and have everyone except counsel leave?

Chair. Haseltine: I think so. I think if you want us to adequately hear a case you've got to give us all the facts.

Comm. Duprey: Well, they've got to figure out whether...

Chair. Haseltine: Including those that may be precluded from public view.

Comm. Duprey: Okay, we'll take a, if everybody would just step outside unless you're a counsel we'll just take a brief executive session. We can turn off the... you can turn off the...

[page 25]

COMMISSION IN EXECUTIVE SESSION
Session Length - approx. 1 hour
Reconvene
back into open session

Atty. Briggs: On behalf of my client under 91-A, I would make a request, because we're dealing with a personnel matter that we go into executive session.

Comm. Duprey: Okay...

Chair. Haseltine: I'll defer to counsel on this one.

Comm. Duprey: There had been a request on behalf of his client that under RSA 91-A:III, which is our, 91-A is our Right-to-Know law, section III deals with executive section, session excuse me, "that a body or agency," and I guess we're a body or agency, "may exclude the public when it is considering or acting upon the following matters: (a) the dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigating of any charges against him unless the employee affected requests an open meeting." Uh, clearly we're an agency that's subject to this section, this is a dismissal action that is being reviewed, the appellant is a public employee, and in fact they

[page 27]

or whatever, are instructed not to discuss their testimony with anyone after they leave this, and we'll remind

each of you as you're in here.

Jay Merwin: Does this mean the entire hearing is closed?

Comm. Duprey: Yes, yes it does, Jay. And we, we will not make a decision in executive session. We never have. We usually take, takes us a month to make a decision...sometimes it takes us too long...

Mr. Merwin: You're not, you're not doing anything today.

Comm. Duprey: Right. That is correct. When we make a decision we'll...

Atty. Briggs: I guess where we left off is I was showing you three documents and I asked you if those were the documents that Elaine had given you... based on your recollection. What, well, let me ask you this, what did Elaine give you? How is that?

Mr. Olkkola: She gave me copies of the three documents that were here on the table when I left.

Comm. Duprey: That's very safe. Very well done, Peter, very well done.

Atty. Briggs: That's where this whole thing began. (Laughter) Uh,

[page 74]

Atty. Briggs: You're...to your knowledge...

Mr. Jones: To my knowledge, other than what she showed today that we thought was not out, I don't know of anything else.

Comm. Duprey: Do you, you still have a copy of that, don't you Bill?

Atty. Briggs: What do you mean?

Comm. Duprey: I think you still have a copy of that. These papers?

Chair. Haseltine: ... give them back to the State.

Atty. Briggs: I didn't think I did.

(pause)

I have nothing further.

Chair Haseltine: You would say, the answer to the question I think...

Comm. Duprey: I just wanted to make sure that we did get all the copies. I, I thought we had three and then we had two and we gave him one, I think Bill has the other one...

Chair. Haseltine: He had them in the first place.

Atty. Platt: I have nothing further.

Mr. Jones: Thank you. Thank you very much.

(7)

Supreme Court, U.S.
FILED
MAR 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1537

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1987

Mary Elaine Crowley,
Petitioner

v.

N.H. Personnel Commission,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

Stephen E. Merrill
Attorney General

Douglas N. Jones
Assistant Attorney
General
Counsel of Record

David S. Peck
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25pp

QUESTION PRESENTED

On appeal from a post-termination state administrative agency hearing upholding the discharge of a state employee for willful insubordination, did the New Hampshire Supreme Court err by not vacating the agency decision for the alleged due process violation of excluding certain documents from evidence, when the record on appeal fails to demonstrate: (1) that the documents were ever offered into evidence; (2) that the employee objected to the documents not being entered into evidence during the agency hearing; (3) that the employee made any offer of proof as to the contents of the documents; and (4) that the employee ever demonstrated any material prejudice resulting from the alleged exclusion of the documents?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Mary Elaine Crowley, and the New Hampshire Sweepstakes Commission (her employer).

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28 U.S.C. §1257 5
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JURISDICTION

This Court is without jurisdiction under 28 U.S.C. §1254(1), as the decision below was not from the courts of appeals. However, this Court may have jurisdiction under 28 U.S.C. §1257.

The respondent, New Hampshire Personnel Commission, respectfully requests that this Honorable Court deny the petition for writ of certiorari, seeking review of an unreported decision of the New Hampshire Supreme Court.

STATEMENT OF THE CASE

Petitioner, Mary Elaine Crowley, worked as a bingo inspector for the New Hampshire Sweepstakes Commission ("Commission") from September, 1981 until November 12, 1985, when she was discharged. Her duties included monitoring bingo games to ensure compliance with applicable laws and regulations. Petitioner had access to confidential Commission files and reports. The Commission's Executive Director, George Jones, received a number of telephone calls from people outside of the Commission, all of whom indicated that they had been in contact with the petitioner and some of whom had knowledge of confidential information. In response to these calls, as well as in response to other events, the

petitioner was informed on several occasions of the need for, and the importance of, maintaining the confidentiality of Commission files and information.

As one step in regaining control over Commission records, Mr. Jones issued an intra-department communication dated April 18, 1985, requiring that all copies of Bingo and Lucky 7 files and information being kept outside the Commission offices be brought back to the premises. Although the petitioner was aware of this directive, she had three such documents at her home which she failed to return to Commission offices.

On October 28, 1985, petitioner's new supervisor asked her if she had ever done an audit of a particular

organization. Petitioner stated that she had not. Later that day, petitioner called her supervisor to report that she had gone through her records at home and found certain papers from the Commission's former director stating that he would do the audits of the organization in question. Upon examination of those papers, petitioner's supervisor determined that they were copies of Commission records concerning Bingo and Lucky 7 investigations. Thus, they were records that were required to have been returned to Commission offices under the terms of the April 18, 1985 directive. As a result of her failure to comply with the April 18th directive, the petitioner was discharged for willful insubordination. Her discharge notice stated that

petitioner must immediately return any other Bingo and Lucky 7 information that she was keeping outside of the office.

Petitioner appealed her termination to the New Hampshire Personnel Commission. A hearing was held on January 20, 1986. At that hearing, the petitioner admitted keeping the three documents in question at her home, but claimed she had forgotten that she had them. She testified both that she thought the papers were important and that she had kept them stored under her mattress (the record does not reveal when the documents were placed under her mattress). Petitioner testified that she never had any intention of using those papers for any purpose of self-preservation. She further testified, however, that she "could not

have given those papers to [the former acting director of the Commission]."

At the hearing, petitioner was in possession of copies of the three documents in question (despite the fact that her discharge order had required her to return any Bingo and Lucky 7 information that she was keeping outside the Commission offices). When petitioner's attorney showed the documents to a witness, the State requested that the Personnel Commission go into executive session to argue whether the documents were confidential. An executive session was then held. As the record reflects, the Personnel Commission indicated that the executive session would not be tape-recorded (Petition for Writ of Certiorari at 14a), and the record

contains no objection by any party to that procedure. Following the unrecorded executive session, the hearing continued. Petitioner's attorney proceeded to cross-examine petitioner's supervisor regarding the three documents. Nowhere does the transcript reflect that petitioner offered the documents into evidence, or that the Personnel Commission excluded the documents over objection. Nor does the transcript show that the Personnel Commission prohibited petitioner from asking questions of witnesses regarding the documents. The transcript reflects no offer of proof by the petitioner regarding the contents of the documents.

The Personnel Commission upheld petitioner's discharge, and denied her request for reconsideration.

Petitioner appealed to the New Hampshire Supreme Court, raising as one issue on appeal that the Personnel Commission denied her due process when it prevented her from introducing evidence vital to her case, i.e., the three documents in question. In her brief, petitioner conceded that her state employment is not "property under New Hampshire law," and that her "state job is not protected as property under the 14th Amendment ... ." Appellant's Brief at 25, 28. Instead, petitioner argued that her employment "is a personal liberty requiring protection." Id. at 28.

In response, the State did not argue whether or not petitioner was entitled to due process protection. The State first argued that petitioner

failed to preserve for appeal any issue as to the Personnel Commission's alleged refusal to permit the introduction of, or cross-examination about, the three documents in question. The State next argued that the petitioner in fact did cross-examine her supervisor about the documents. The State finally argued that even assuming that the Personnel Commission erred, petitioner failed to demonstrate any material prejudice resulting therefrom. State's Brief at 25-30.

After full briefing and oral argument, the New Hampshire Supreme Court concluded that disposition of this case did not require a formal written opinion, and affirmed. Petitioner's motion for reconsideration was denied. Petitioner thereafter filed her petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I. ADEQUATE AND INDEPENDENT STATE GROUNDS EXIST TO SUPPORT THE DECISION BELOW.

In her petition for a writ of certiorari, petitioner's single "question presented" is whether due process prevents a state administrative agency from refusing to allow petitioner to introduce, or cross-examine certain witnesses about, three documents. That issue was not properly preserved for appeal to the New Hampshire Supreme Court. As the State argued in its brief to the New Hampshire Supreme Court, it was petitioner's burden under state law to ensure that all objections appear as a matter of record in order to be considered by the State Supreme Court. See Brewster v. State, 107 N.H. 226,

227, 219 A.2d 706, 707 (1966); Glynn v. N.H. Personnel Commission, 116 N.H. 810, 813, 372 A.2d 1303, 1305 (1976). The record does not demonstrate that the three documents in question were offered into evidence, that they were excluded from evidence by the Personnel Commission, that any objection or offer of proof concerning the documents was made by petitioner to the Personnel Commission, or that petitioner was prohibited from asking any witness any questions about the documents. Under those circumstances, petitioner failed to preserve any issue for appeal; no abuse of discretion by the Personnel Commission could be found as a matter of state law. See Brown v. Cathay Island, Inc., 125 N.H. 112, 115-16, 480 A.2d 43, 44-45 (1984); Sklar Realty, Inc. v.

Town of Merrimack, 125 N.H. 321, 328, 480 A.2d 149, 153 (1984). "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in the United States Supreme Court, as long as the State has a legitimate interest in enforcing its procedural rule." Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978). Accordingly, this Court should deny the petition for a writ of certiorari.

II. NO ISSUE CONCERNING PETITIONEP'S ALLEGED PROPERTY INTEREST IN HER STATE EMPLOYMENT WAS RAISED OR ARGUED BELOW.

As her first reason for granting a writ of certiorari, petitioner contends that "[a] long line of appellants to the

New Hampshire Supreme Court, including petitioner, have sought without success to assert that a classified state employee has a property interest in his or her state employment, entitled to the protection afforded by the Fourteenth Amendment." Petition for a Writ of Certiorari at 7. In fact, however, petitioner did not raise this issue below. As discussed above, petitioner conceded in her brief filed in the New Hampshire Supreme Court that her state job is not protected as property under the 14th Amendment. Petitioner's Brief at 28. Thus, this issue is being raised for the first time in this Court.

Of equal importance is the fact that the issue of whether due process protections applied to the Personnel Commission hearing simply was not

involved in the decision of this case. Neither before the Personnel Commission nor before the New Hampshire Supreme Court did the State argue that due process protections were or were not applicable. Instead, the State argued that the specific evidentiary challenges made by petitioner were not preserved for appeal, that the petitioner in fact did cross-examine her supervisor concerning the documents in question, and that even assuming error, petitioner failed to show material prejudice. Thus, no contested issue concerning the applicability of due process was presented to the New Hampshire Supreme Court for decision.

Finally, the State Supreme Court's decision does not hold that petitioner was not entitled to due process. The

court found it unnecessary to write a formal written opinion, there being no abuse of discretion nor error of law. The court cited Desmarais v. State Personnel Commission, 117 N.H. 582, 586, 378 A.2d 1361, 1363 (1977). Although petitioner treats this citation as evidence that the court decided the unargued due process/property right issue, an examination of 117 N.H. at 586, the page cited by the court, reveals that it was cited for the unexceptional propositions that an appellate court does not sit as a trier of fact, and that administrative findings of fact are entitled to great weight and cannot be set aside lightly. That citation is consistent with the main issue argued on appeal below, i.e., whether the evidence supported the

Personnel Commission's finding that the petitioner's failure to return the three documents was willful.

Although Desmarais also discusses whether public employment is a protected property right, that discussion occurs in 117 N.H. at 588-89. These pages were not cited below. Thus, there is simply no reason to believe that any issue of due process protection was involved in the New Hampshire Supreme Court's decision.

Ordinarily, the United States Supreme Court does not decide questions not raised or involved in the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976). This Court should therefore decline to decide the question presented in this petition.

III. THE ISSUES PRESENTED ARE NOT IMPORTANT ENOUGH TO WARRANT REVIEW.

As demonstrated above, the New Hampshire Supreme Court was not presented with a contested issue involving the application of due process protections to public employment. Instead, it was faced with deciding whether an alleged objection to an alleged exclusion of evidence was properly presented as an issue for appeal, and if so, whether the alleged exclusion was erroneous and materially prejudicial. Such routine issues do not warrant review by this Court.

CONCLUSION

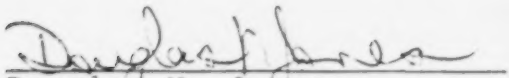
For all of the above-stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

N.H. PERSONNEL COMMISSION

By its attorneys,

Stephen E. Merrill
Attorney General



Douglas N. Jones
Assistant Attorney General
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March 31, 1988

I hereby certify that three copies of the foregoing was mailed this day, postage prepaid, to W. Michael Dunn, Esquire, 1000 Elm Street, Manchester, N.H. 03101, counsel of record.

Douglas N. Jones